IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2003 Session

IN RE ADOPTION OF WILLIAM DREW MUIR

Appeal from the Circuit Court for Marion County
No. 13722 Buddy Perry, Judge

No. M2002-02963-COA-R3-CV - Filed November 25, 2003

This appeal involves the termination of the parental rights of the biological father of a five-year-old child. The child's mother and her husband filed a petition in the Circuit Court for Marion County seeking to terminate the biological father's parental rights and to approve the husband's adoption of the child. They proceeded with the petition even after they were divorced. Following a bench trial in May 2002, the trial court entered an order on December 2, 2002 denying the petition on the ground that the mother and her former husband had not established by clear and convincing evidence that the biological father had abandoned the child. The mother has appealed. We have determined that the December 2, 2002 order must be vacated because the trial court failed to make the specific findings of fact required by Tenn. Code Ann. § 36-1-113(k) (Supp. 2003).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Charles G. Jenkins, Sr., Jasper, Tennessee, and Lisa Z. Espy, Chattanooga, Tennessee, for the appellant, April Ann Muir Whited.

Marshall A. Raines, Jr., Jasper, Tennessee, for the appellee, Donald Ray Dalton.

OPINION

I.

Donald Ray Dalton and April Holcomb had a non-marital child in 1996. Mr. Dalton, who was nineteen at the time, stopped seeing Ms. Holcomb for approximately eight months, and during this time, he had a brief affair with seventeen-year-old April Ann Muir. Mr. Dalton's dalliance with Ms. Muir understandably piqued Ms. Holcomb, and she and Ms. Muir came to blows while Mr. Dalton and Ms. Muir were dating. Mr. Dalton returned to Ms. Holcomb soon after he learned that Ms. Muir was pregnant with his child.

Even though Mr. Dalton had taken back up with Ms. Holcomb, he continued a relationship of sorts with Ms. Muir. He accompanied her on several visits to her obstetrician, and he purchased a changing table and crib for the baby before he was born. When William Drew Muir was born in Fort Oglethorpe, Georgia in March 1998, Ms. Muir pointedly declined to include Mr. Dalton's name on the birth certificate. Mr. Dalton briefly visited Ms. Muir and the child in the hospital and had four other brief visits with the child. Mr. Dalton's last visit with his son occurred in September 1998.

Within weeks after her son's birth, Ms. Muir began dating Derrick E. Whited whom she had met shortly after Mr. Dalton left her for Ms. Holcomb. She and Mr. Whited began living together in January 1999 and married in June 1999. Mr. Whited financially supported both Ms. Whited and her son and developed a parental relationship with the child even though the boy was not his child. Eventually, the Whiteds had a child of their own.

In January 2000, the Whiteds filed a petition in the Circuit Court for Marion County seeking to terminate Mr. Dalton's parental rights and for the step-parent adoption of William Drew Muir by Mr. Whited. Mr. Dalton contested the petition to terminate his parental rights. Mr. Dalton eventually married Ms. Holcomb in May 2000. He did not contact Ms. Whited directly about visiting his son after the petition was filed, and his lawyer's informal efforts to arrange for visitation were rebuffed. Between April and June 2000, Mr. Dalton forwarded four support checks to Ms. Whited, but she returned them on the advice of her lawyer.

Even though the Whiteds had been divorced in November 2001, they insisted at the May 2002 hearing that they desired to proceed with the adoption because Mr. Whited was the only father William Drew Muir had ever known. On December 2, 2002, the trial court filed an order denying the petition to terminate Mr. Dalton's parental rights because "there had not been a willful abandonment by Defendant Donald Ray Dalton as to the minor child William Drew Muir." On March 25, 2003, the trial court entered another order directing Mr. Dalton to pay Ms. Whited $20,534.07 in back child support and childbirth expenses and to begin paying $78 per week in prospective child support. The order also provided Mr. Dalton with defined, although limited, visitation rights. Ms. Whited has appealed from the trial court's decision declining to terminate Mr. Dalton's parental rights.[1]

II.
THE STANDARD OF REVIEW IN TERMINATION CASES

Proceedings to terminate parental rights are entirely statutory. Persons seeking to terminate a parent's rights with regard to his or her child must prove two things. First, they must prove the existence of at least one statutory ground for termination.[2] Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, ___ S.W.3d ___, ___ , 2003 WL 22383609, at *6 (Tenn. 2003); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Second, they must prove that terminating the parent's parental rights

[1]Mr. Dalton has not appealed from the trial court's decisions regarding past or prospective child support.

[2]The statutory grounds for terminating parental rights are found in Tenn. Code Ann. § 36-1-113(g).

is in the child's best interests.[3] Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

In light of the constitutional dimension of parental rights, persons seeking to terminate these rights must prove all the elements of their case by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re A.W.*, 114 S.W.3d at 545. This heightened standard of review prevents unwarranted termination or interference with a biological parent's parental rights. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d at 622. Evidence that satisfies the clear and convincing evidence standard eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *Walton v. Young*, 950 S.W.2d 956, 960 (Tenn. 1997); *In re C.D.B.*, 37 S.W.3d 925, 927 (Tenn. Ct. App. 2000). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the propositions sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact de novo in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 546; *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).[4]

III.
FINDINGS OF FACT AND CONCLUSIONS OF LAW IN TERMINATION CASES

A trial court's responsibility to make findings of fact and conclusions of law in termination cases differs materially from its responsibility in other civil cases. Generally, trial courts, sitting without juries, are not required to make findings of fact or conclusions of law unless requested in accordance with Tenn. R. Civ. P. 52.01. Termination cases, however, are another matter. Tenn. Code Ann. § 36-1-113(k) explicitly requires trial courts to "enter an order which makes specific

[3]The factors to be considered in a "best interests" analysis can be found in Tenn. Code Ann. § 36-1-113(i).

[4]These decisions draw a distinction between specific facts and the combined weight of these facts. Tenn. R. App. P. 13(d) requires us to defer to the trial court's specific findings of fact as long as they are supported by a preponderance of the evidence. However, we must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial court's ultimate factual conclusion. The Tennessee Supreme Court used this approach in *In re Valentine* when it recognized the difference between the conclusion that a biological parent had not complied substantially with her obligations in a permanency plan and the facts relied upon by the trial court to support this conclusion. *In re Valentine*, 79 S.W.3d at 548-49; *see also Jones v. Garrett*, 92 S.W.3d at 838.

findings of fact and conclusions of law" in termination cases. Thus, trial courts must prepare and file written findings of fact and conclusions law with regard to every disposition of a petition to terminate parental rights, whether they have been requested or not.

Tenn. Code Ann. § 36-1-113(k) reflects the Tennessee General Assembly's recognition of the necessity of individualized decisions in these cases. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999) (holding that termination cases require "individualized decision making"). It also reflects the General Assembly's understanding that findings of fact and conclusions of law facilitate appellate review and promote the just and speedy resolution of appeals. *Bruce v. Bruce*, 801 S.W.2d 102, 104 (Tenn. Ct. App. 1990). Because of Tenn. Code Ann. § 36-1-113(k), trial courts cannot follow the customary practice of making oral findings from the bench and later adopting them by reference in their final order.[5]

When a trial court has not complied with Tenn. Code Ann. § 36-1-113(k), we cannot simply review the record de novo and determine for ourselves where the preponderance of the evidence lies as we would in other civil, non-jury cases.[6] In accordance with *In re D.L.B.*, ___ S.W.3d at ___, 2003 WL 22383609, at *6, we must remand the case for the preparation of appropriate written findings of fact and conclusions of law. In this case, the trial court made no specific findings of fact to support its conclusion that Mr. Dalton had not willfully abandoned William Drew Muir. Therefore, we must vacate the December 2, 2002 order and remand the case to the trial court for preparation of the findings of fact and conclusions of law required by Tenn. Code Ann. § 36-1-113(k).

IV.
CRITERIA FOR DETERMINING WILLFULNESS UNDER TENN. CODE ANN. § 36-1-102(1)(A)

Because we have remanded this case for the preparation of findings of fact and conclusions of law, it would be well to revisit the legal framework for analyzing termination claims. The threshold issue in every termination case is whether the parent whose rights are at stake has engaged in conduct that constitutes one of the grounds for termination of parental rights in Tenn. Code Ann. § 36-1-113(g). If the answer is "yes," the trial court must then determine whether the child's interests will be best served by terminating the parent's parental rights. If the answer is "no," the court should proceed no further and should dismiss the termination petition. The trial court did not get past the threshold question in this case because it determined that Mr. Dalton's conduct did not warrant terminating his parental rights.

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[5]This court appears to have condoned the use of oral findings of fact and conclusions of law in a termination case in at least one unpublished memorandum opinion. We decline to cite or follow this opinion in light of Tenn. Ct. App. R. 10 which states that a memorandum opinion "shall not be cited or relied upon for any reason in any unrelated case."

[6]*E.g.*, *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Ms. Whited's petition to terminate Mr. Dalton's parental rights rests solely on Tenn. Code Ann. § 36-1-113(g)(1). Echoing the language of one of the statutory definitions of "abandonment," she alleged that Mr. Dalton had abandoned his son because "for a period of four (4) consecutive months immediately preceding the filing of . . . [the petition] . . . ., [he had] willfully failed to visit or . . . [had] willfully failed to support or make reasonable payments toward the support of the child." Ms. Whited could not rely on the irrebuttable presumption of abandonment for failure to support found in Tenn. Code Ann. § 36-1-102(1)(D) (Supp. 2000) because the Tennessee Supreme Court had struck down the presumption in 1999. *In re Swanson*, 2 S.W.3d at 188.

When the Tennessee Supreme Court invalidated Tenn. Code Ann. § 36-1-102(1)(D), it reinstated the prior definition of abandonment that required "intent" with regard to failure to support until the General Assembly cured the constitutional deficiency with the statute. *In re Swanson*, 2 S.W.3d at 189. The General Assembly had not acted by the time Ms. Whited filed her petition in January 2000. Accordingly, the elements of "abandonment" were found in Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 1994). *In re Swanson*, 2 S.W.3d at 189 n.14. The General Assembly has now corrected the statute's constitutional shortcomings. Accordingly, any reconsideration of Ms. Whited's abandonment claim must be guided by current law.

For the purposes of Ms. Whited's abandonment claim, current law defines "abandonment" as follows:

> For a period of four (4) consecutive months immediately preceding the filing of a . . . pleading to terminate the parental rights of the parent(s) . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) . . . either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(i). In addition, Tenn. Code Ann. § 36-1-102(1)(D) defines "willfully failed to support" as "the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child." Likewise, Tenn. Code Ann. § 36-1-102(1)(E) defines "willfully failed to visit" as "the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation."

The concept of "willfulness" is at the core of the statutory definition of abandonment. For the purpose of Tenn. Code Ann. § 36-1-102(1)(A)(i), a parent cannot be found to have abandoned a child unless the parent either has "willfully" failed to engage in more than token visitation or has "willfully" failed to provide more than token monetary support to the child for four consecutive months. "Willfully" is a word of many meanings, and so each use of the word must be interpreted with reference to the statutory context in which it appears. *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996); GEORGE W. PATON, A TEXTBOOK ON JURISPRUDENCE 313 n.2 (4th ed. 1972) (suggesting that use of the word should be avoided because of its ambiguities).

"Willfulness" does not require the same standard of culpability required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 409 (Fla. Dist. Ct. App. 1999). Nor does it require malevolence or ill will. *In re Adoption of a Minor*, 178 N.E.2d 264, 267 (Mass. 1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir. 1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994); *In re Adoption of Earhart*, 190 N.E.2d 468, 470 (Ohio Ct. App. 1961); *Meyer v. Skyline Mobile Homes*, 589 P.2d 89, 96 (Idaho 1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to support a child is "willful" when a person is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support.[7] *Shorter v. Reeves*, 32 S.W.3d 758, 760 (Ark. Ct. App. 2000); *In re B.S.R.*, 965 S.W.2d 444, 449 (Mo. Ct. App. 1998); *In re Estate of Teaschenko*, 574 A.2d 649, 652 (Pa. Super. Ct. 1990); *In re Adoption of CCT*, 640 P.2d 73, 76 (Wyo. 1982). A biological parent's willful failure to support or visit is not excused by a custodial parent's or third party's conduct unless the conduct either actually prevents the parent from performing his or her duty to support or visit, *In re Adoption of Lybrand*, 946 S.W.2d 946, 950 (Ark. 1997), or amounts to a significant restraint or interference with the parent's efforts to support or develop a relationship with his or her child. *In re Serre*, 665 N.E.2d 1185, 1189 (Ohio Ct. C.P. 1998); *Panter v. Ash*, 33 P.3d 1028, 1031 (Or. Ct. App. 2001).[8] Thus, attempts by others to frustrate or impede a parent's visitation do not necessarily provide a justification for failing to financially support a child. *Bateman v. Futch*, 501 S.E.2d 615, 617 (Ga. Ct. App. 1998); *In re Leitch*, 732 So. 2d 632, 636 n.5 (La. Ct. App. 1999).

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *American Cable Corp. v. ACI Mgt., Inc.*, No. M1997-00280-COA-R3-CV, 2000 WL 1291265, at *4 (Tenn. Ct. App. Sept. 14, 2000) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000). A person's demeanor and credibility as a witness also play an important role in determining intent. Accordingly, trial courts are best suited for making willfulness determinations. *In re D.L.B.*, ___ S.W.3d at ___, 2003 WL 22383609, at *6.

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[7] A parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995); *Pierce v. Bechtold*, 60 Tenn. App. 478, 487, 448 S.W.2d 425, 429 (1969).

[8] Conduct that amounts to a significant restraint or interference with a parent's efforts to support or develop a relationship with a child includes (1) telling a man he is not the child's biological father, (2) blocking access to the child, (3) keeping the child's whereabouts unknown, (4) vigorously resisting the parent's efforts to support the child, or (5) vigorously resisting a parent's efforts to visit the child. *In re S.A.B.*, 735 So. 2d 523, 524 (Fla. Dist. Ct. App. 1999); *In re Adoption of Children by G.P.B., Jr.*, 736 A.2d 1277, 1286 (N.J. 1999); *Panter v. Ash*, 33 P.3d at 1031.

It is essentially undisputed that Mr. Dalton neither supported nor visited his child for fifteen consecutive months before Ms. Whited filed the termination petition. However, Ms. Whited and Mr. Dalton presented dramatically different versions of the events during this time. Mr. Dalton insisted that he telephoned Ms. Whited at least twice a month requesting to visit his son and that she rebuffed him. He also stated that he did not try to contact Ms. Whited after February 1999 because Mr. Whited had told him to stop bothering her and that "Will [already] had a father in his life." Mr. Dalton also asserted that he paid $150 toward Ms. Whited's childbirth expenses and that he had intended to pay more but stopped making the payments after Ms. Whited refused to permit him visitation with his son. He also stated that Ms. Whited refused his offers of financial support on other occasions and that he told her to call him if she ever needed money. He offered no explanation for failing to send his son birthday or Christmas presents or for not using the courts to establish his parentage and, thereby, to secure his support obligations and visitation rights.

For her part, Ms. Whited insisted that she telephoned Mr. Dalton repeatedly and "begged" him to visit their son. According to Ms. Whited, Mr. Dalton "always had something better to do." She also testified that Mr. Dalton told her in early 1999 that he "still loved me and wanted to be with me but that he couldn't see Will because of [Ms. Holcomb]." In addition, Ms. Whited denied ever preventing Mr. Dalton from visiting his son or telling him that she did not want financial support from him. She stated that she heard little from Mr. Dalton during 1999 and that she was uncomfortable allowing Will around Ms. Holcomb because Ms. Holcomb had stated that she "hated" Ms. Whited and her child.

The pivotal questions in this case are whether Mr. Dalton willfully failed either to visit or to support his son for at least four consecutive months before Ms. Whited filed her petition to terminate his parental rights. It is difficult to discern the factual basis or the legal rationale for the trial court's decision that Mr. Dalton's failure to support or visit his son for fifteen consecutive months was not willful. However, it is not our role to speculate about the basis for the trial court's decision. It is the trial court's obligation in the first instance to provide this explanation.

V.

We vacate the December 2, 2002 order and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to April Ann Muir Whited and her surety and to Donald Ray Dalton for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.